SUPREME COURT, U. S.

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MICHAEL RODAK, JR.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1359

HENRY I. SIEGEL CO., INC., - - - Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD, - Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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March, 1974.

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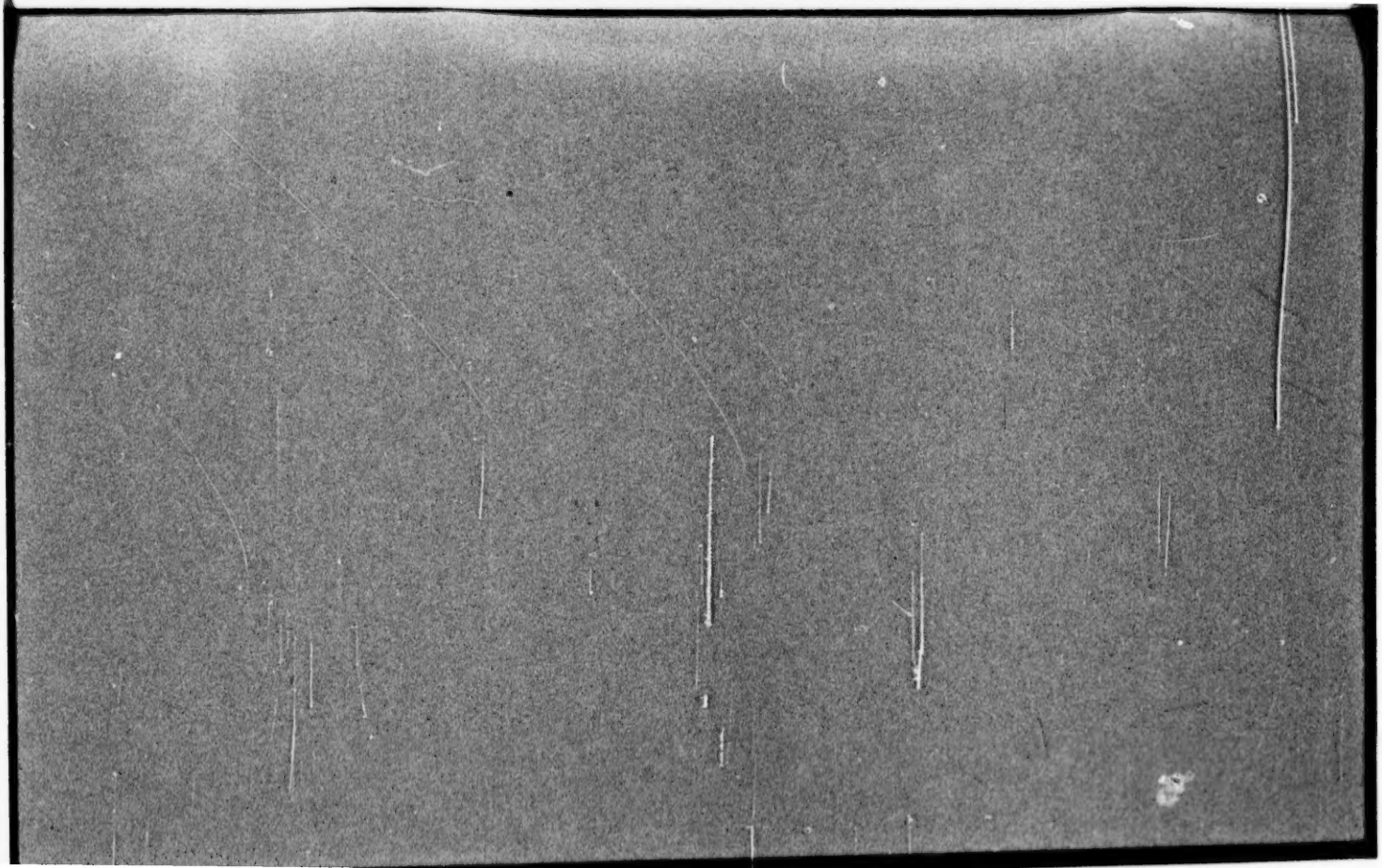

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No. _____

HENRY I. SIEGEL CO., INC., - - - *Petitioner,*

v.

NATIONAL LABOR RELATION BOARD, - - *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

The petitioner Henry I. Siegel Co., Inc., respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on December 10, 1973, which said order enforced an order of the National Labor Relations Board.

OPINION BELOW.

The order of the Court of Appeals (Appendix, *infra,* p. 15) is reported at 487 F. 2d 518.

The order of the National Labor Relations Board (Appendix, *infra,* pp. 16-17), and the decision of the Administrative Law Judge (Appendix, *infra,* pp. 18-50) are reported at 202 N.L.R.B. No. 125, but have not yet been compiled into the bound official report.

JURISDICTION.

The order of the Court of Appeals for the Sixth Circuit was entered on December 10, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED.

Approximately six weeks after a union loss of election in a unit of truck drivers and mechanics, three drivers were discharged by the Company, the stated reason being abuse of break privileges. The Administrative Law Judge, whose decision was summarily affirmed by the Board and the Court below, found in testimony of two of the three dischargees coercive interrogation, threats and creation of the impression of surveillance.[1] The discharges were found to be discriminatory, the Company's cause defense being rejected on the basis that no specific warnings of abuse of break privilege were given and the discharge action was therefore irrational, harsh and arbitrary (Appendix, *infra*, pp. 38-45).

The question presented is:

Whether under the National Labor Relations Act, there being any evidence of coercive activity by the

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[1]The denials of coercive conversations were rejected, the drivers' testimony being regarded as more reliable, logical and sincere. The Administrative Law Judge found it unnecessary to resolve the conflict between the drivers' testimony of break time of only 15-20 minutes and Company proof of 30-40 minutes for which they were discharged. [Decision, fn. no. 13, Appendix, *infra*, p. 45]. *Query.* Does such disposition reflect a proper exercise of the adjudicatory function and entitle the credibility resolutions to binding effect?

employer, proof of discharge for cause may be rejected on the basis that the discharge action was harsh and unreasonable, and the stated reason being thus dissipated as pretense, the discharge may be found to have been made for an antiunion purpose?

STATUTORY PROVISIONS INVOLVED.

A. National Labor Relations Act, as amended [49 Stat. 499, 61 Stat. 136, 73 Stat. 519, 29 U.S.C.A. §§ 151 *et seq.* (1973)].

Unfair Labor Practices

Sec. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: . . .

Prevention of Unfair Labor Practices

Sec. 10(c) . . . No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.

(e) . . . The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.

B. Administrative Procedure [5 U.S.C. §§ 551 *et seq.*].

Sec. 556(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. . . . A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence.

STATEMENT OF THE CASE.

The Company employs truck drivers who deliver piece goods to, and return manufactured articles of clothing from, outlying Company plants to a central distribution center.

A Union campaign among the drivers began around the first of August.[2] The campaign was quiet, there being no proof of Company activity except as to certain conversations hereinafter stated. The drivers did not wear Union buttons and authorization cards were signed away from the plant. In late October the Union lost the election, sixteen eligible employees voting ten to six against the Union. After the election there was no further activity.

In June the Company became concerned that the drivers were taking too long on breaks at a restaurant near one of the Company's plants, by which the drivers were customarily routed. Surveillance of their activities was ordered and was conducted by the Company's

[2]All references are to the year 1971.

security manager. No established break period existed for the drivers, but they had been told that they might take breaks for reasonable periods of time not to exceed fifteen to twenty minutes.

The surveillance was intermittent in June and July, and ceased during the Union campaign. It was resumed in November. The surveillance revealed that those drivers who stopped stayed from ten minutes to one hour. Around the first of December, the Company's president, being again informed of the situation, ordered that the drivers found abusing their privilege should be immediately fired.

Acting on those instructions, a vice-president whose duties encompassed supervision of the driving operations, directed the security manager and the immediate supervisor of the drivers to go to the restaurant, and if they found drivers stopping for a break over fifteen to twenty minutes, to fire them on the spot.

On the morning of December 9, these orders were implemented. Three drivers—Hicks, Foster and Presson—were dispatched in the direction of the restaurant. Hicks and Presson arrived and stopped at the restaurant first, and Foster shortly thereafter. Although each testified that he stayed only fifteen to twenty minutes, that is, within acceptable limits, the security manager and the foreman found them to be there forty and thirty minutes. Each was discharged.

The drivers otherwise had good records, with no recorded derelictions. Each had signed a Union card. Hicks had been active in the Union campaign, soliciting authorization card signatures, attending a meeting

at his house, at that of another employee and at a neighboring city, and serving as Union observer at the election. Foster and Presson had attended a Union meeting which had not been held for the Company's employees. Additionally, Foster had attended the meeting in the neighboring city.

Presson had no conversations concerning the Union with Company officials. Hicks and Foster did. Prior to the filing of the election petition, Hicks was allegedly told in one that if he stuck his neck out he might get it chopped off and that if he was dissatisfied with his work he should quit; Foster was allegedly told by a Company vice-president and by his supervisor on separate occasions that some employees could lose their jobs if the Union were voted in.

Other than the testimony of Foster and Hicks, there was no proof of Company interference in the activities of any of the other employees in the unit.

The Administrative Law Judge found that the proof sustained all allegations of the complaint, rejected the Company's reason for discharge on a harsh-and-unreasonable therefore-pretext rationale, and found the Company guilty of discriminatory discharges, coercive interrogation, creating the impression of surveillance, and threats of reprisal. The Company seasonably filed its exceptions to his decision, which was summarily affirmed by the Board. Proceeding under Section 10(f) of the National Labor Relations Act [29 U.S.C. § 160(f)], which section vests jurisdiction in a Court of Appeals to review final orders

of the Board, the Company petitioned for review of the Board order. The Court of Appeals for the Sixth Circuit entered a memorandum order enforcing the order of the Board.

The Company, believing that the Administrative Law Judge substantially misconstrued and misapplied applicable principles of law, and that that error was compounded by the Board and Court below, has respectfully filed this petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT.

The Company is not blind to the *Universal Camera* limitations imposed on this Court—that the function of review of Board orders is lodged in the Courts of Appeal and that this Court will intervene only where the standard has been misapprehended or grossly misapplied.[3]

Why, then, should its discretionary review be afforded in this case? Are not charges of discriminatory discharge under Section 8(a)(3) of the Act commonplace and litigation of the issues involved routinely handled?[4]

It is precisely the fact that the volume of cases is great that suggests the need for this Court to state or

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[3]Universal Camera Corp. v. NLRB, 340 U. S. 474 (1951). See also, Golden State Bottling Co. v. NLRB, __ U. S. __, 38 L. Ed. 2d 388, 396 (1973); NLRB v. Walton Mfg. Co., 369 U. S. 404, 408 (1962).

[4]Sixty-three percent of the charges filed in fiscal year 1972 involved allegations of 8(a)(3) violations. 37 NLRB Ann. Rep. 225, Table 2 (1973). Offers of reinstatement were made pursuant to Board or Court order in 313 cases, and back pay of $3,589,380 was recovered. *Id.* at 228-29, Table 4.

restate clear and definitive guidelines—specific mandates to guide the labor bench and bar in the just determination of those disputes. If principles are hazy and ill-defined, or if application of supposedly established principles is random and uncertain, as this case reflects, the propensity for litigation is increased.

General principles have been enunciated by this Court. *Universal Camera*[5] teaches that under the Administrative Procedure Act and the Taft-Hartley Act the Board's order must rest on substantial evidence on the record considered as a whole, taking into account whatever fairly detracts from its weight, and that the reviewing court must assume more responsibility for the reasonableness and fairness of Board decisions and must be influenced by the feeling that it is not to abdicate the conventional judicial function. Further, it has been stated that the finding of a violation of Section 8(a)(3) normally turns on whether the discriminatory conduct was motivated by an antiunion purpose, but once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to *some* extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him.[6] When specific evidence of a subjective intent to discriminate or to encourage or discourage union membership is shown and

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[5]340 U. S. at 487-88, 490. "The rule of substantial evidence is one of fundamental importance and is the dividing line between law and arbitrary power." NLRB v. Thompson Products, Inc., 97 F. 2d 13, 15 (6th Cir. 1938).

[6]NLRB v. Great Dane Trailers, Inc., 388 U. S. 26, 33-34 (1967).

found, such proof itself is normally sufficient to destroy the employer's claim of a legitimate business purpose and provides strong support to a finding that there is interference with union rights or that union membership will be discouraged; conduct which on its face appears to serve legitimate business ends is "wholly impeached" by the showing of an intent to encroach upon protected rights; the employer's "claim of legitimacy is totally dispelled."[7]

How are these principles to be viewed and applied? The Administrative Procedure Act, placing the burden of proof on the proponent of a rule or order,[8] speaks in terms of the ultimate risk of nonpersuasion, and is inconsistent with the principle that the burden is on the employer *to establish* motivation by legitimate objectives, unless that principle means going forward with proof to avoid an adverse finding. If proof of discharge for a reason other than that statutorily prohibited is submitted, the ultimate risk of nonpersuasion should remain on the General Counsel and not be subtly placed on the employer. The Board's determination of violation, carrying with it exposure to substantial monetary liability, should be based on persuasive proof from the entire record and an inference of unlawful purpose should not be made or drawn in the absence of such proof.

Section 10(c) of the National Labor Relations Act forbids the reinstatement of a discharged employee, if such individual was discharged for cause. Is a dis-

[7]NLRB v. Erie Resistor Corp., 373 U. S. 221, 227-28 (1963).
[8]80 Stat. 386 (1966), 5 U.S.C.A. § 556(d) (1967).

charge for cause defense "wholly impeached" and "totally dispelled" by accepted proof of independent 8(a)(1) violations, and by rejection of the advanced reason for discharge as being harsh and unreasonable? "Cause" under the Act has not been taken to mean "good" or "just" cause. Given the statutory edict, the issue of unlawful discharge must be separately viewed and decided. While evidence of related violations may be considered in its determination, that evidence, even if fully accepted, should not completely rebut a cause defense. Further, any stated impression or reasoning that the discipline imposed was not commensurate with the offense, and that it was accordingly unreasonable, goes beyond the statutory limit imposed and is wholly improper. Management may be harsh, its personnel policies even seemingly arbitrary, but the Board should not judge from that frame of reference.

The terse orders entered by the Board and the Court below afford no insight as to their rationale; the review ostensibly afforded under the Act—the obligation to make an independent review of the whole record—is not apparent. Their effect is to place a stamp of approval on the decision of the Administrative Law Judge.

Although the proof showed that the Company's policy with respect to breaks and the length thereof had been explained to the drivers, the Administrative Law Judge stressed the absence of a specific warning of the consequences of failure to abide by that policy. The Board has recognized that abuse of break privi-

leges is a proper subject of management concern, even to the extent of discharge.[9] The Eighth Circuit has held that where cause exists, there is nothing that requires an employer to warn an employee of the danger of discharge.[10] One question presented is whether a warning is a prerequisite to a lawful discharge. Certainly the Board has no power to impose a system of progressive discipline, under penalty of an adverse finding for failure to comply.

The function of the Board is to determine not whether an employee was fired for good or just cause, but whether he was terminated for an unlawful reason.[11] The Courts of Appeal have accordingly held that the employer has the right to discharge an employee for good reason, bad reason or no reason, absent discrimination, that the Act does not interfere with the normal exercise of the rights of the employer to select its employees or to discharge them, or give the Board any control whatsoever over an employer's policies, and that once it is determined that disciplinary action is warranted the extent of the action taken is purely within the discretion of the employer for whom the Board may not substitute its judgment.[12]

The rejection of the Company's asserted reason for the discharges clearly rested on the judgment of

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[9]Firestone Tire & Rubber Co., 165 N.L.R.B. 435, 444 (1967).

[10]Osceola County Co-Operative Creamery Ass'n v. NLRB, 251 F. 2d 62, 65 (8th Cir. 1958).

[11]NLRB v. Jones & Laughlin Steel Corp., 301 U. S. 1, 45-46 (1937).

[12]See, *e.g.*, NLRB v. Arkansas Grain Corp., 392 F. 2d 161, 167 (8th Cir. 1968); NLRB v. Ace Comb Co., 342 F. 2d 841, 847 (8th Cir. 1965); NLRB v. Howell Automatic Machine Co., 454 F. 2d 1077, 1081 (6th Cir. 1972).

the Administrative Law Judge that the Company's action was harsh and arbitrary, "bizarre from any industrial relations point of view" and not that taken by an employer "acting rationally" or by "an enlightened employer."[13] The only decision cited by the Administrative Law Judge was that of *McGahey*.[14] The decision there, however, rejected an evaluation of the discharge in terms of its reasonableness, it being beyond the power of the Board to second-guess or give gentle guidance by over-the-shoulder supervision to management. The principle of the decision has been accepted in other circuits.[15] Certainly, such rejection is proper if the Board in fact has no right to substitute its judgment for that of management in disciplinary areas.

The Administrative Law Judge found what he considered to be a strong prima facie case presented by the General Counsel. The proof of discharge for cause by abuse of break privileges was swept away by the harsh-pretext rationale, which in turn he viewed as evidence of improper motivation.

If the principle of *McGahey* and like cases is sound, the decision rests on an erroneous legal foundation, and should have been set aside.[16] If the principles are not sound, this Court should so state.

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[13]Decision, Appendix, infra, pp. 39, 43, 44.

[14]NLRB v. McGahey, 233 F. 2d 406, 412-13 (5th Cir. 1956); Decision, Appendix, *infra*, p. 45.

[15]See, *e.g.*, NLRB v. Ogle Protection Service, Inc., 375 F. 2d 497, 505 (6th Cir. 1967); Portable Electric Tools, Inc. v. NLRB, 309 F. 2d 423, 426 (7th Cir. 1962); NLRB v. Ace Comb Co., 342 F. 2d 841, 846-47 (8th Cir. 1965).

[16]NLRB v. Brown, 380 U. S. 278, 292 (1965).

In a somewhat analogous situation, this Court has undertaken to specify the order of proof required to establish a violation of the Civil Rights Act of 1964; there it has indicated that an employer's rebuttal proof to a prima facie case should not be underestimated, and that in the absence of proof of pretextual or discriminatory application of the reason for the managerial action a finding of violation cannot stand.[17] It is true that here other drivers had previously engaged in like activity and had not been discharged, but on the day of the implementation of the decision to discharge those abusing the privilege, only Hicks, Foster and Presson were discovered. It is further true that the Company, although it has been involved in numerous election campaigns and other litigation with the Board and has been found to have violated other provisions of the Act, has never been found guilty of discriminatory discharge. A decision of pretextual or discriminatory application, under the circumstances, is founded on quivering sands.

The Company submits that in this case, the Court should exercise its discretion and grant the writ. The case is important in that proper legal standards were not applied and the standard of review was therefore misapprehended or grossly misapplied. Further, the Court should clearly enunciate whether lack of warning, coupled with a harsh-pretext rationale, is a sufficient basis for a Board finding of discriminatory discharge.

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[17]McDonnell Douglas Corp. v. Green, 411 U. S. 792 (1973).

CONCLUSION.

For these reasons, the Company prays that the petition be granted and that a writ of certiorari issue to review the order of the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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March, 1974.